**CALIFORNIA STATE BOARD OF EQUALIZATION**

**CURRENT LEGAL DIGEST NO. 1074**

**July 31, 2007**

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Revise annotation 105.0076 **Corporate Aircraft Used in Interstate Operations.** An aircraft purchased out of state and brought into California within 90 days after purchase could qualify for the exemption provided in Regulation 1620(b)(2)(B) provided it is used continuously in the corporation's interstate operation (e.g., transportation of company's employees from one state to another). Intrastate flights in another state will not affect the exemption from the California tax. 9/15/83. (Am. 2006-1) (Am. 2007-2)

~~(~~Note: ~~SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, f~~For the period October 2, 2004 through June 30, ~~2006~~2007, ~~and~~ under ~~the~~ certain conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).~~)~~

120.1176 **Data Recovery Services**. When a computer disk drive loses data due to software issues or physical damage to the drive like fire, water, etc., taxpayer performs various operations designed to retrieve the lost data for the customer. Taxpayer buys DVDs, CDs and refurbished disk drives on a tax-paid basis or tax is accrued at the time of purchase. The taxpayer's charge for this service is generally between $500 and $1,000 and the operations generally fall into five categories:

1. The customer's disk drive is sent to taxpayer who recovers the data and puts it back on the disk drive. The disk drive, along with the restored data, is returned to the customer.

2. The customer sends their damaged and unusable disk drive to the taxpayer. The data is recovered and posted on a website. The broken drive is returned to the customer along with a login code and password that allows the customer to download the data from the website.

3. The customer sends the disk drive to taxpayer who determines that the disk drive is damaged and unusable. The data is recovered and saved on DVD/CD, which is returned to the customer along with the broken drive.

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4. The customer sends their damaged and unusable disk drive to the taxpayer. The data is recovered and saved on a refurbished disk drive, which is sent back to the customer. A lump-sum fee with no break out of the refurbished drive is charged to the customer.

5. Same as number 4, but the sales invoice is broken out between the charge for the data recovery service and the disk drive.

In general, data recovery services are not taxable and tangible personal property transferred pursuant to these services is incidental. If the service provider transfers tangible personal property to the customer that is not incidental to the performance of the service, the service provider is the retailer and sales tax applies to the sale of such property. On the other hand, Regulation 1501 provides that the transfer of incidental tangible personal property by the person performing the service is a nontaxable event. In such case, tax applies to the service provider's acquisition of the property used in performing the service.

The first and second scenarios above do not include the transfer of tangible personal property to the customer, other than the return of the customer's own disk drive. If the operations are remedial measures to correct a hardware problem, they are repair operations and regarded as a service.

Remedial measures to correct a software malfunction, such as a corrupted file allocation table that no longer records the location of the customer's data on the storage device, constitute the processing of customer-furnished information, the charge for which is not subject to tax. The creation of a new file allocation table that allows the customer to regain access to the lost data is considered to be summarizing and sorting the customer's existing data and sales tax will not apply to charges for this service, pursuant to Regulation 1502. In addition, since the customer only obtains the data by accessing it and downloading it from the website, there is no sale of tangible personal property, and no tax would apply to the charges for this service.

The remaining three scenarios involve the transfer of tangible personal property in the form of a storage medium that was not furnished by the customer and which contains the customer's restored data. Under the assumption that these scenarios arise from an unrepairable storage device or corrupted data, we regard the data as no longer existing in its original form, and any recovered data constitutes "original information" derived from data furnished by the customer. The true object of the contract is the performance of a data recovery service and the storage medium furnished to the customer is merely incidental to providing the service.

However, the last scenario provides for a separately stated charge for the refurbished disk drive that is transferred to the customer. In this case, the taxpayer is the retailer of the refurbished disk drive and this charge is subject to tax. If taxpayer purchases the disk drives on a tax-paid basis, a tax-paid purchases resold deduction may be taken and the taxpayer is required to hold a seller's permit for these types of transactions. 3/16/07. (2007-2).

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Delete Annotation 240.0005, **Balloons** (11/20/90; 05/29/96) because the annotation could be interpreted to apply to other tangible personal property beyond the scope of Regulation 1571.

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Revise annotation 325.0009 **Corporate Aircraft Used in Interstate Operations.** An aircraft purchased out of state and brought into California within 90 days after purchase [see note below] could qualify for the exemption provided in Regulation 1620(b)(2)(B) provided it is used continuously in the corporation's interstate operation (e.g., transportation of company's employees from one state to another). Intrastate flights in another state will not affect the exemption from the California tax. 9/15/83. (Am. 2006-1). (Am. 2007-2).

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain conditions specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. (Regulation 1620(b)(5).

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Revise annotation 325.0010.750 **Delivery of Aircraft in Oregon.** A purchaser intends to take delivery of a jet aircraft in Oregon. From the delivery point in Oregon, the aircraft will be flown to Nevada during which the purchaser will perform at least three landings for purposes of obtaining certification as a pilot for the aircraft. The aircraft will not touch down in California on this flight. The aircraft will be based in Nevada for 91–100 days and flown to non-California locations during this time. The aircraft will be regarded as first functionally used outside California when the taxpayer flies it in order to obtain pilot certification. Therefore, if the aircraft does not enter California within 90 days after its purchase, excluding time of storage for shipment to California, use tax will not apply to the use of the aircraft in California. 8/13/96. (Am. 2006-1). (Am. 2007-2)

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain conditions specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).)

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Revise annotation 325.0081 **Out-of-State Delivery of Motorhome.** A California motorhome dealer will make a sale of a motorhome to a California resident who will take delivery out of state. The purchaser will functionally use the motorhome for a period of not less than 90 days outside of California. The vehicle may be registered in California.

Revenue and Taxation Code section 6247 creates a presumption as to the retailer that property delivered outside of California to a purchaser known to be a resident of California is regarded as having been purchased for use in California. The section 6247 presumption may be controverted by a statement in writing, signed by the purchaser, and retained by the dealer that the property was purchased for use outside of California. If the dealer takes a section 6247 statement in good faith, the dealer is no longer responsible for collecting use tax even if the purchaser actually purchased the motorhome for use in California. Under such circumstances, the purchaser, of course, would be liable for the applicable use tax. In order to regard the section 6247 statement as being taken in good faith, the dealer must believe that the motorhome is being purchased for use outside this state and be without knowledge of any facts which would put a reasonable prudent business under similar circumstances on notice that the motorhome is being purchased for use in this state. [See Cal. U. Com Code section 1201(19).] If the dealer obtains a section 6247 statement from a purchaser who requests that the dealer register the vehicle in California, and it is subsequently determined that the purchaser purchased the motorhome for use in California, the dealer's good faith acceptance of the section 6247 statement may be questioned.

If the motorhome is functionally used outside of California in excess of 90 days from the date of purchase prior to the date of entry into California, exclusive of any time of shipment to California, or time of storage for shipment to California, Regulation 1620(b)(4) provides that such use will be accepted as proof of an intent that the motorhome was not purchased for use in California. Therefore, under these circumstances, use tax would not apply. This analysis would apply regardless of whether the motorhome is registered in California. 8/12/96. (Am. 2006-1). (Am. 2007-2).

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Revise annotation 325.0082 **Out-of-State Lease of Vessel.** A cruise company purchases a vessel from an out-of-state ship builder. The cruise company enters into a bareboat charter agreement with the shipbuilder, whereby the cruise company leases the vessel back to the

shipbuilder for at least 91 days. The cruise company would receive a percentage of the revenues generated by the use of the vessel during the charter period.

The shipbuilder will host no charge parties to exhibit the vessel to generate future business for both the shipbuilder and the cruise company. Profit making charters would also be made. All of this use will occur outside California.

After expiration of the charter, the vessel would be brought to California for use in California waters by the cruise company.

The vessel is mobile transportation equipment. The use by the lessee (the shipbuilder) is therefore attributed to the lessor (the cruise company). Since the vessel was used outside California for more than 90 days before entering California, it is presumed that it was not purchased for use in California and no tax applies. 8/30/91. (Am. 2006-1). (Am. 2007-2).

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Revise Annotation 325.0094 **Purchase of Motor Home.** A California resident purchased a large motor home with about 10,000 miles from a dealer in Oregon on or about April 15, 1996. Since the purchase, the motor home has been stored in Oregon when not in use. The California resident claims he has taken two trips to date in the motor home, one for 1,500 miles in May 1996 and the other for 1,200 miles in June 1996, all outside California. He plans to use the vehicle in August 1996 to go to Canada, expects to put another 2,500 miles on it, and then bring it into California. The vehicle carries enough fuel for more than 2,000 miles so that owner claims he cannot provide fuel or maintenance receipts establishing the date or itinerary of any of the use.

It is necessary for a purchaser who claims that he did not purchase the property for use in this State to overcome the presumption in section 6248 that it was purchased for use in California. It is difficult for a purchaser to overcome the presumption that the vehicle was purchased for use in California solely upon declarations and odometer readings. It is reasonable to expect that the purchaser would have some documentation to support his contention that he used the vehicle outside California for more than 90 days. [See note below] The type of documents that could be used to support the purchaser's contention are receipts for purchases made out of state for groceries to provision the vehicle, dining out and entertainment receipts or ticket stubs from movies, receipts for maintenance such as oil changes or other repairs to the vehicle, receipts for registration at parks or other facilities used during travel, receipts for dumping of waste, and

telephone bills showing calls made from places outside the State. 9/27/96. (Am. 2006-1). (Am. 2007-2).

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Revise annotation 325.0103 **Repair Is Use.** A California resident purchased and took possession of a vehicle in Europe. He used the vehicle in Europe for about a month at which time the vehicle was involved in an accident and was damaged. He returned to California about 60 days after he purchased the vehicle. Repairs to the vehicle took an additional 60 days. The vehicle was then shipped to the buyer in California.

Repair of the vehicle was an exercise of a right of ownership by the buyer. In determining whether the vehicle was used outside California for 90 days or more, the time required for repair should be included. 12/8/87. (Am. 2006-1). (Am. 2007-2).

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Revise annotation 325.0165 **Time Aircraft Is Refurbished Out of State.** A California resident accepted delivery of and took title to an aircraft out of state. The aircraft, carrying a passenger, was flown into California. The aircraft was subsequently delivered to a company in Florida to complete a major refurbishing of the aircraft.

At the time the aircraft was purchased, a jet engine was also purchased. At the time of purchase, the jet engine was located out of state where it underwent maintenance. After the maintenance was completed, the jet engine was shipped to Florida and attached to the aircraft.

Since the aircraft was first functionally used outside California and entered California within 90 days of purchase, the principal use test applies to determine if the aircraft was purchased for use in California. [See note below]. The time the aircraft was being refurbished out of state is considered storage or use outside of California, (Section 6008). Therefore, if the time for refurbishment added to any other storage and/or use taking place outside of California equals or

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exceeds one-half of the six-month test period immediately following the aircraft's initial entry into California, use tax will not be due on the purchase price of the aircraft.

With respect to the jet engine, if the time of repairs and attachment was in excess of 90 days from the date of purchase to the date of entry in California, it will be presumed that the jet engine was not purchased for use in California. On the other hand, the time which the engine was shipped to California or stored for shipment is not counted towards prior out-of-state use in excess of 90 days. If the time of actual use outside California (i.e., repairs) exceeded 90 days, excluding the time of shipment and storage for shipment to California, use tax will not be due on the purchase price of the jet engine. 5/15/95. (Am. 2006-1). (Am. 2007-2).

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Revise annotation 325.0185 **Use or Storage for Purposes of the Six-Month Test.** An aircraft purchased from a retailer outside California was first functionally used outside this state and brought into California within 90 days after its purchase. [See note below]. To determine whether the property was used or stored outside California one-half or more of the time during the six-month period immediately following its entry into this state, both the use and the storage of the property during that six-month period are important and relevant. During this six-month test period, the aircraft could be both stored and used or only stored or only used. For this test, the particular type of use or storage, such as flight time or repair time or hangar time, is irrelevant. The type of use or storage may become relevant if the aircraft fails the test to determine whether it was purchased for use in California, and the purchaser then seeks an exemption from use tax under sections 6366 or 6366.1. 9/9/99. (2000-2). (Am 2006-1). (Am. 2007-1).

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain conditions specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).)

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Revise annotation 325.0198 **Vessel Purchased Out of State.** A taxpayer is purchasing a yacht from a manufacturer in the State of Florida. The taxpayer will pay for the yacht in Florida, and the seller will deliver the yacht to the taxpayer in Florida. After the purchase, the taxpayer may use the yacht in Florida for a short period of time, possibly as little as 14–21 days. The taxpayer will then have the vessel broken down in Florida and shipped by a licensed carrier to California. Upon arrival in California, a third party will, for a fee paid by the taxpayer, reassemble the yacht. Upon that reassembly, the taxpayer will have the yacht placed into the ocean at San Diego, California, and the yacht will then be voyaged to Mexico for a minimum of four to five months of continuous usage in Mexican territorial waters.

Since the yacht enters California within 90 days of purchase, it is presumed to have been purchased for use in California. [See note below]. Tax applies unless the taxpayer overcomes that presumption. The presumption can be overcome by showing that the vessel will be used outside of California one-half or more of the time during the six-month period immediately following its entry into California. Assuming that the yacht will be in California no more than one month prior to departing California waters for Mexico, the yacht will be used outside California for at least four months during the six months immediately following its entry into California. As such, the taxpayer will overcome the presumption that he purchased the yacht for use in California and use tax will not apply.

On the other hand, if the taxpayer does not use the yacht in Florida and the vessel is first functionally used in California, the yacht would be considered to have been purchased for use in California and will be subject to use tax measured by the sales price of the yacht. 10/21/96. (Am. 2006-1). (2007-2).

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Revise annotation 325.0210 **Warranty Repairs on Aircraft - 90-Day Rule.** When an aircraft's first functional use occurs outside of this state and the aircraft is subsequently brought into California within 90 days after delivery solely for the purpose of having warranty repairs at an authorized factory service center, ~~the time in California is included within the six month ''principal use'' test period~~the aircraft shall not be deemed to be acquired for storage, use, or other consumption in this state under certain conditions set forth in Regulation 1620(b)(5)(B)2. 6/7/91. (Am. 2006-1). (2007-2).

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conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).~~)~~

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Revise annotation 325.0220 **Yacht Moved to California for Repairs.** Taxpayer purchased a yacht in South Carolina on October 28, 1994, with the intent to travel outside U.S. waters. The vessel was stored in South Carolina until it was determined that a refit was necessary to make the boat seaworthy and safe for extended sea voyages. The vessel moved to Long Beach, California for the major refit because it was in proximity to Arizona where the owner resides. The vessel arrived in California on February 7, 1995 - 102 days after the purchase of the vessel. On February 13,1995, the vessel suffered $45,000 in fire damage when the boat next to it burned to the waterline. The refit could not be performed and the vessel could not leave U.S. waters.

The taxpayer is required to establish that the vessel was used outside California for more than 90 days prior to its entry into California, **exclusive of time of shipment and time of storage** for shipment to California. [See note below]. If the vessel was not used outside California more than 90 days prior to its entry into this state, the taxpayer will be presumed to have purchased the vessel for use in this state and will owe use tax, unless the taxpayer can establish that the vessel was used or stored for one-half or more of the time during the six-month period immediately following its entry into this state (which was February 7, 1995). [See Regulation 1620 (b)(3).] In this case, the vessel was outside the state for ninety days, but there is no evidence of functional use. Lacking such evidence, it will be regarded as purchased for use in California since it was located here for one-half or more of the time during the six-month period following its entry into California. The fact that the vessel was here longer than anticipated because of the fire is not relevant in determining whether the vessel was purchased for use in California. 7/2/96. (Am. 2006-1). (Am. 2007-2).

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Revise annotation 325.0428 **Documentation Supporting Out-of-State Delivery of Vessel.** When the delivery of a vessel and transfer of title is made at a point outside of California territorial waters by a California boat dealer to a California resident, the following documentation should be retained to substantiate the out-of-state delivery and that the vessel was not purchased for use in California:

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(1) The seller should prepare a bill of sale which states the terms of delivery of the vessel and transfer of title and which is signed by both the person making the delivery and the purchaser. The purchaser should sign the bill of sale at the time at which transfer takes place and note on the document the date and place of transfer.

(2) The seller should obtain and retain copies of the ship's log showing the trip.

(3) The seller should obtain and retain a statement signed under penalty of perjury by the purchaser stating that the vessel is not being purchased for use in California and that if the vessel enters California within 90 days of purchase (excluding time of shipment and storage for shipment), it will be used outside of California for more than one-half of the six-month period immediately following its entry into this state. [See note below].

(4) The purchaser should keep adequate records to document the location of principal use of the vessel for the six months immediately following its entry into California after purchase, e.g., complete ship's logs of date and periods that vessel is in and out of California, receipts of payment for berthing, and any other receipts or documents supporting out-of-state use and location of vessel. 6/23/97. (Am. 2006-1). (2007-2).

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Revise annotation 325.0570.300 **Ownership and Possession Transferred Outside California.** A yacht berthed in California is to be purchased by an out-of-state corporation. The purchase, which is to be documented by the United States Coast Guard, will take place outside the offshore limits of California. The yacht will return to California for the purpose of refit, provisioning and sea trials to ensure its sea worthiness and safety for long range cruising. The period of time the yacht is in California will not exceed 90 days. [See note below]. Thereafter, the yacht will be involved in extensive world cruising for several years. There will be no plans to return to California.

If ownership of the yacht transfers outside the territorial limits of the state of California, neither sales tax nor use tax will apply to the purchase of the yacht based on the above facts. For sales and use tax purposes, a sale occurs at the place the property is located at the time ownership (title transfers) occurs. The parties to the agreement should retain written documentation that the sale (1) occurred outside this state, (2) the yacht was first functionally

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used outside this state, and (3) it was outside California one half or more the time during the first six months following its entry into California. 1/3/96. (Am. 2006-1). (Am. 2007-2).

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Revise annotation 325.0602.600 Vessel Delivered Outside California Waters. Taxpayer is purchasing a new vessel from a California manufacturer and seller (seller). The taxpayer has paid progress installments to the seller for work completed on the vessel. Under the terms of the contract of sale, the taxpayer will make final payment for the vessel after final inspection and delivery of the vessel at a point more than three nautical miles from California. The taxpayer will take a separate transport vessel to meet the vessel for final inspection and approval. After final inspection and approval, the taxpayer will give the final payment to the seller and the seller will give the taxpayer a bill of sale. Title to the vessel will pass from the seller to the taxpayer at that time.

After taxpayer obtains possession and control of the vessel, the taxpayer will pleasure sail the vessel for the day and return the vessel to a California harbor. The vessel will remain in this state for less than 90 days. While in California, it will be prepared for shipment via common carrier to Florida. In Florida, the vessel will be reassembled and sailed in international waters, and then to its final destination at a point in the Mediterranean Sea.

The first functional use of the vessel after its transfer to the taxpayer will occur outside of California when it is used for pleasure sailing. However, since the vessel will reenter California within 90 days of its completed delivery and purchase, it is presumed to have been purchased for use in California. [See note below]. If the purchaser establishes that the vessel is used or stored outside of California one-half or more of the time during the six-month period after it enters California, the vessel will not be considered purchased for use in California and its use will not be subject to use tax. 5/30/97. (Am. 2001-3). (Am. 2006-1). (Am. 2007-2).

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain conditions specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).)

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Revise annotation 325.2400 **Vessel Delivered Outside of California.** A California retailer of vessels enters into a contract with a California resident for the sale of a customized vessel and delivery at an ‘‘offshore delivery point.’’ Provisions of the contract of sale require several partial payment deposits with the final payment due and payable after Buyer’s final inspection and acceptance of the vessel at the ‘‘offshore delivery point.’’ Seller’s right to retain the deposits are contingent upon Buyer’s acceptance of the vessel after final inspection. The risk of loss remains with the Seller up to the ‘‘final inspection and delivery’’ to Buyer. Possession and control is to remain with Seller prior to delivery of the vessel to Buyer. No title clauses are expressed in the contract. Under Uniform Commercial Code section 2401 and Regulation 1628(b)(3)(D), absent a contractual provision that title passes prior to delivery, title passage occurs at the time seller completes its duties with respect to physical delivery of the property. Under these circumstances, the sale of the vessel occurs outside California and, thus, is not subject to sales tax.

As long as the vessel is delivered outside of California, is first functionally used outside of California, and is functionally used in excess of 90 days outside of California prior to any entry into California, the Buyer’s subsequent California use, if any, will not be subject to California’s use tax. [See note below]. If the vessel is delivered outside of California and enters California waters within 90 days after purchase, the Buyer will be subject to use tax unless the vessel is used or stored outside of California one-half or more of the time during the six months after the vessel entered California waters. 7/9/97. (Am. 2006-1). (Am. 2007-2).

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain conditions specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).)

**Note**: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.

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Revise annotation 330.2370 **Motor Vehicles—Interstate Transactions.** A taxpayer leased a car in Texas and within 90 days was transferred to California by his employer. In accordance with Texas tax law, the lessor had paid tax on the purchase price of the vehicle. A vehicle brought into the state within 90 days may be subject to use tax on the purchase price while one brought in after 90 days would not be subject to tax on the purchase price. [See note below]. Since the vehicle entered the state within 90 days from the date of purchase, the lessor has the option to pay California use tax on cost and receive a credit for Texas sales tax paid. If the lessor fails to make this timely election, use tax will be due on the rental receipts. In this case, although at the time the lease started the lessee did not know he was to be transferred to California, the possession of leased property by a lessee is a continuing purchase for use in this state and the lease payments are subject to use tax. The lessee is not entitled to an offset credit pursuant to section 6406 because the Texas tax was imposed on the lessor and the California use tax on rental payments is imposed on the lessee. 5/10/91. (Am. 2006-1). (Am. 2007-2).

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain conditions specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).)

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Revise annotation 330.2550 **Out-of-State Prior Lease.** In March 1994, the lessee took delivery of a vehicle in Illinois. The vehicle did not enter California until January of 1995, when the lessee relocated to California. At the time of delivery of the vehicle to the lessee in Illinois, the lessee paid an amount as ‘‘sales tax’’ on the base cost of the vehicle.

Since the vehicle was used outside of California for over 90 days prior to its entry into this state, the lessor is not regarded as having purchased the vehicle for its use in California. [See note below]. This means that the lessor would owe no California use tax on its own use of the vehicle in this state, and thus the option of paying tax on the purchase price of the vehicle is not available to it. The lease constitutes a continuing sale and purchase, for which the lessor must collect use tax on the lease receipts from the lessee.

The lessee’s payment of ‘‘sales tax’’ appears to be either reimbursement to the lessor for tax or tax reimbursement it paid or it was a payment made to Illinois on behalf of the lessor for tax liability imposed upon and owed by the lessor on its purchase price of the vehicle. The lessee may not take credit against its use tax liability for any taxes paid by or paid on behalf of the lessor on its purchase price of the vehicle. 8/25/95. (Am. 2006-1). (Am. 2007-2).

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain

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conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)5).~~)~~

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Revise annotation 330.3575, **Termination Fee.** When a lease contract requires the lessee to pay the lessor a ''termination fee'' at the end of the lease term, the ''termination fee'' is usually merely an additional final rental payment. Such a fee is subject to the use tax. Even if the lessee is advised that the fee covers costs associated with ~~disposing of the returned property and/or~~ processing the lease payoff, ~~these~~ this ~~are~~ is merely an overhead expense~~s~~ ~~which~~ that cannot be deducted from taxable rentals whether separately itemized or not. 6/10/94. (Am. 2007-2).

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Revise annotation 330.3680 **Out-of-State Use of Leased Vehicle.** A resident of New York leased an automobile from a New York automobile dealer. Under New York law, the lessor is required to pay New York sales tax ''up front'' on the full purchase price of the vehicle. Two years after leasing the vehicle, the lessee moved to California and continued to lease the vehicle.

Since the lessor did not purchase the vehicle for use in California (did not enter this state within 90 days), the lessor owes no use tax on its use of the vehicle in California. [See note below]. Therefore, it may not elect to pay tax to California measured by the purchase price and take credit for tax paid to another state as provided by section 6406. Since no California tax has been paid on the purchase price, the lease is a continuing sale and the rental payments are subject to use tax. 12/7/93. (Am. 2006-1). (Am. 2007-2).

~~(~~Note: ~~SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, f~~For the period October 2, 2004 through June 30, ~~2006~~2007, ~~and~~ under ~~the~~ certain conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).~~)~~

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Revise annotation 335.0003 **Aircraft Purchased Out-of-State.** A person purchases an airplane outside California and enters California in less than ninety days from the date of the delivery of the plane. [See note below].

(a) It is presumed that the purchase was made for use in California, and use tax applies to the purchase price of the plane unless the use of the plane will be limited to leasing. If so, the use tax liability of the purchaser may be paid measured by the fair rental value of the plane if the purchaser makes a timely election to do so.

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A person purchases an airplane outside California and uses it more than ninety days prior to its first entry into California.

(b) The airplane is regarded as not having been purchased for use in California and use tax does not apply. Since the lease of MTE is not a sale pursuant to Revenue and Taxation Code Section 6006 (g)(4) but rather is regarded as use by the lessor, and since use tax does not apply to the purchaser's use of the plane in California, use tax also does not apply to the purchaser's lease of the plane. 10/25/89; 5/15/91. (Am. 2006-1). (Am. 2007-2).

(Note: ~~SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, f~~For the period October 2, 2004 through June 30, ~~2006~~2007, ~~and~~ under ~~the~~ certain conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).~~)~~

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Revise annotation 335.0021 **First Functional Use Out of State.** A ready-mix concrete truck was purchased by a lessor outside California. It was first functionally used outside California by the lessee and was so used for over 90 days before entry into California [see notes below].

The subsequent use of the truck by the lessor in California is not subject to tax. Since the out-of-state lease of the mobile transportation equipment is considered as the lessor's own use, and not a sale or purchase under the Sales and Use Tax Law, the subsequent lease of such mobile transportation equipment by the lessor in California is not subject to sales or use tax. 9/12/88. (Am. 2006-1). (Am. 2007-2).

~~(~~(Note: ~~SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, f~~For the period October 2, 2004 through June 30, ~~2006~~2007, ~~and~~ under ~~the~~ certain conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).~~)~~

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**Delete** Annotation 335.0089.800, **Use of Property by Lessor** (8/5/87), because it was replaced by a more substantive legal opinion in annotation 335.0089.700.

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Revise annotation 432.0028 **Developmental Software as ''Printed Sales Message''**. ~~Before a~~A software company~~, who~~ is in the business of selling software programs for resale.~~,~~ Before the

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company actually mass produces a ~~product~~software program, ~~the company does~~ extensive ~~developing~~ product development is performed by sending early versions of the software to approximately 2,000 persons at no charge to the recipient. The recipients use the free software and ~~point about~~notify the software company of any ‘‘bugs’’ ~~to the software company~~found in the program.

The exemption for ‘‘printed sales messages’’ ~~would~~ does not apply to the sale of the computer software. Tax applies to the sale to the software company of the disks, the disk duplicating services and the supporting manuals ~~to the software company~~. 5/3/93. (Am. 2007-2).

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Revise annotation 490.0727 **Software/Hardware Post-Warranty Service Agreement.** Taxpayer, in connection with sale of network computing products including workstations, servers, software and microprocessors, offers customers post-warranty services on a contractual basis after the initial product warranty has expired. The post-warranty support services are offered through a four level multi-tiered program. Each level of support is sold for a single price and provides the customers with bundled hardware maintenance, operating system enhancements, and specific software telephone/on-line support, including patches and enhancements.

Since the customers are offered an optional lump-sum service agreement for both hardware and software maintenance, the service agreement is regarded as both an optional maintenance agreement on the equipment as well as an optional maintenance agreement for the software. Tax does not apply to that portion of the ‘‘hardware only’’ support agreement which relates to actual hardware maintenance. However, tax does apply to that portion of the agreement which represents the charges for the maintenance of the operational programs (software) since such software maintenance agreements consist of providing updates in tangible form (on storage media) to a prewritten operational program. Tax also applies to charges for consultation services (i.e., technical support) related to the operational program maintenance agreement unless the consultation is optional and such fees are separately stated. [Regulation 1502(f)(1)(C).] 4/22/97. (Am. 2007-2).

Note: Effective January 1, 2003, 50 percent of the charge for optional software maintenance agreements is subject to tax. Prior to that date, generally 100 percent of the charge was subject to tax.

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495.0011 **Agent for Client**. The client of the Taxpayer is a full-service corporate meeting and event planning company that negotiates and procures services for the client including, but not limited to, food, beverage, transportation, leisure activities, décor, entertainment, audio visual and multi-media services, premium gifts, etc. The client is billed for all products and services procured on the client’s behalf itemized at cost along with a separately stated management fee.

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The California Civil Code defines an agent as, "one who represents another, called the principal, in dealings with third persons." The difference between an agent and a supplier of property is discussed in the Restatement Second of Agency at section 14K which states, "one who contracts to acquire property from a third person and convey it to another is the agent of the other only if he is to act primarily for the benefit of the other and not for himself." Restatement Second of Agency section 424 requires that, "… an agent employed to buy…is subject to a duty to the principal, within the limits set by the principal's directions, to be loyal to the principal's interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal."

Therefore, in order to be recognized for purposes of the Sales and Use Tax Law as an agent that may obtain tangible personal property on behalf of a client, the taxpayer must do all of the following:

1. Taxpayer must have written evidence of its status as the client's agent (this may be included in its contract with its client);
2. Taxpayer must clearly disclose to all third-party vendors of tangible personal property the name of the client and that Taxpayer is acting as an agent of its client in making any purchases; and
3. Taxpayer must bill the same amount to the client as the third-party vendor bills to Taxpayer.

In order to confirm in an audit that Taxpayer is the agent of its client, Taxpayer must separately state on its invoices to the client all amounts billed to the client for tangible personal property and all amounts billed as a "management fee." Additionally, as an agent, Taxpayer may make no use for its own account of any tangible personal property it purchases for the client, and may not issue a resale certificate for any property that it purchases for the client. 3/20/07. (2007-2).

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Revise annotation 505.0360 **Unincorporated Agencies or Instrumentalities.** Sales of tangible personal property to the following committees and boards are exempt sales to unincorporated agencies or instrumentalities of the United States under Section 6381(a):

Almond Board of California
California Date Administrative Committee
California Desert Grape Administrative Committee
California Olive Committee
Cotton Board
Hass Avocado Board
Kiwi Fruit Administrative Committee
Lemon Administrative Committee
Mushroom Council

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Navel Orange Administrative Committee
Nectarine Administrative Committee
Oregon-California Potato Committee
Prune Marketing Committee
Raisin Administrative Committee
Tokay Industry Committee
Valencia Orange Administrative Committee
Walnut Marketing Board

The following four agencies are commonly known as the ‘‘California Tree Fruit Agreement Control Committee:’’
Pear Commodity Committee,
Peach Commodity Committee,
Plum Commodity Committee,
Winter Pear Control Committee. 4/25/89; 12/4/90; 3/8/91; 5/17/94. (Am. 2000–1). (Am. 2007- 2).

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Revise annotation 505.0600 **Raisin Advisory Board and California Avocado Commission.** Sales of personal property to the Raisin Advisory Board and the California Avocado Commission are subject to sales tax. ~~It is a~~ They are both state boards created pursuant to Food and Agricultural Code Section 58841, not created pursuant to federal regulation. 12/4/90. (Am. 2007-2)

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515.0001.100 **Agent for Client**. The client of the Taxpayer is a full-service corporate meeting and event planning company that negotiates and procures services for the client including, but not limited to, food, beverage, transportation, leisure activities, décor, entertainment, audio visual and multi-media services, premium gifts, etc. The client is billed for all products and services procured on the client's behalf itemized at cost along with a separately stated management fee.

The California Civil Code defines an agent as, "one who represents another, called the principal, in dealings with third persons." The difference between an agent and a supplier of property is discussed in the Restatement Second of Agency at section 14K which states, "one who contracts to acquire property from a third person and convey it to another is the agent of the other only if he is to act primarily for the benefit of the other and not for himself." Restatement Second of Agency section 424 requires that, "… an agent employed to buy…is subject to a duty to the principal, within the limits set by the principal's directions, to be loyal to the principal's interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal."

**Note**: The new proposed annotations contained in this CLD are drafts and may not accurately reflect the text of the final annotation.

Therefore, in order to be recognized for purposes of the Sales and Use Tax Law as an agent that may obtain tangible personal property on behalf of a client, the taxpayer must do all of the following:

4. Taxpayer must have written evidence of its status as the client's agent (this may be included in its contract with its client);

5. Taxpayer must clearly disclose to all third-party vendors of tangible personal property the name of the client and that Taxpayer is acting as an agent of its client in making any purchases; and

6. Taxpayer must bill the same amount to the client as the third-party vendor bills to Taxpayer.

In order to confirm in an audit that Taxpayer is the agent of its client, Taxpayer must separately state on its invoices to the client all amounts billed to the client for tangible personal property and all amounts billed as a "management fee." Additionally, as an agent, Taxpayer may make no use for its own account of any tangible personal property it purchases for the client, and may not issue a resale certificate for any property that it purchases for the client. 3/20/07. (2007-2).

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Revise annotation 570.0590 **Functional Use.** A vessel was built and delivered to the purchaser outside California for the stated purpose of racing in the ''Around Alone'' solo sailing race around the world. One week after it was purchased, the vessel was sailed into California where it made various appearances at boat shows and other events, participated in both crewed and solo races and was used to conduct ''classroom seminars'' over the next 10 months. These activities were conducted in order to obtain funds for equipping the vessel and to attract race sponsors. The vessel then departed California and, to date, has not returned to this state.

The purchaser asserts that the first functional use of the vessel occurred when the vessel raced solo for the first time from the East Coast of the United States in the ''Around Alone'' race after departing this state. The purchaser makes this assertion because the vessel was created specifically to be sailed around the world by one person in the ''Around Alone'' solo sailing race and is not suitable for recreational sailing or coastal yacht racing. Therefore, the purchaser contends that no California sales or use tax is owed because no functional use was made of the vessel in this state.

Sales and Use Tax Regulation 1620(b)(3) specifies that ''functional use'' means use for the purposes for which the property was designed. The functional use of a racing sailboat is to sail. When the vessel was delivered to the purchaser outside California and it subsequently was sailed from the out-of-state location into this state, the first functional use of the vessel occurred outside California. Although the first functional use of the vessel occurred outside California, the vessel entered this state within 90 days of its purchase and was used in California more than one-half of

the time during the six-month period following its entry into this state [see note below]. Therefore, although the vessel was first functionally used outside California, it was also used in this state in such a way that it is considered to have been purchased for use in this state. Therefore, the purchase of the vessel is subject to use tax. 3/6/03. (2004–1). (Am. 2006-1). (Am. 2007-2).

(Note: SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, fFor the period October 2, 2004 through June 30, 20062007, and under the certain conditions specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).)

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Revise annotation 570.0920 **Intent to Use in State.** A vehicle purchased in California for use overseas and sold upon return to California within 90 days of original purchase [see note below] is presumed to have been acquired for storage, use or other consumption in this state and therefore is subject to tax. If it can be shown that use in California was not intended within 90 days of purchase, the board will exempt the use from tax. However, changing the registration of the car to that of the wife indicates intent to use the vehicle in California. 10/5/64. (Am. 2006-1). (2007-2).

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Revise annotation 570.1220 **Aircraft—Installation of Interior.** A new airplane purchased out-of-state is brought to California for the sole purpose of having an interior installed.

Upon completion of the installation, the airplane is to be delivered to the purchaser out-of-state without any other use or storage here. Installation of the interior is a step in the manufacturing process necessary to put the airplane in a functional condition. Assuming that the airplane is put to its first functional use outside California, the period during which the airplane is here while the interior is being installed will not be considered for use tax purposes. Thus, the airplane will be subject to use tax only if it re-enters California within ninety days [see note below] of its completed delivery and thereafter is principally used here during the ensuing six months. 11/4/66. (Am. 2006-1). (Am. 2007-2).

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conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).

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Revise annotation 570.1243 **Aircraft Refurbishing.** An out-of-state company purchases a used commercial aircraft which is delivered outside California with title and possession transferring out of state. Shortly after the purchase, the first functional use of the aircraft is transporting representatives of the purchaser to another location outside California. Prior to ninety days from the date of purchase [see note below], the aircraft is flown to California for refurbishing which includes the installation of a new interior to modify the aircraft for noncommercial use. The refurbishing in California will take more than six months to complete. Upon completion of the refurbishing, the aircraft will be delivered to the purchaser outside California. Thereafter, the aircraft will be used non-commercially, solely outside the state.

The installation of an interior in an aircraft is the incorporating of tangible personal property into other tangible personal property. Accordingly, the act of installing the interior does not constitute ''storage'' or ''use'' of the aircraft when the aircraft is to be immediately transported outside California and thereafter used solely outside this state. If the sole utilization of the aircraft in California will be that of installing a new interior, the use tax will not be applicable pursuant to Regulation 1620(b)(5). The transportation of the aircraft into California under its own power will also be excluded from the term use. 5/7/86. (Am. 2006-1). (Am. 2007-2).

~~(~~Note: ~~SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, f~~For the period October 2, 2004 through June 30, ~~2006~~2007, ~~and~~ under ~~the~~ certain conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248~~, any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).

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Revise annotation 580.0360 **Servicemen - Date of Receipt of Orders Transferring to California.** If a serviceman takes delivery of a car outside California before he receives orders transferring him to California, no use tax is applicable. The serviceman is also not liable for use tax under Section 6249 of the Revenue and Taxation Code if he arrives in California 90 or more days [see note below] after delivery of the car outside California, regardless of whether he received his orders before or after delivery of the car because it is presumed that he did not purchase the car for use in California. Section 6249 is not applicable to civilians. 11/6/69. (Am. 2006-1). (Am. 2007-2).

~~(~~Note: ~~SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, f~~For the period October 2, 2004 through June 30, ~~2006~~2007, ~~and~~ under ~~the~~ certain

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conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).

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Revise annotation 585.8000 **Vessel Delivered Outside of California.** A California retailer of vessels enters into a contract with a California resident for the sale of a customized vessel and delivery at an ''offshore delivery point.'' Provisions of the contract of sale require several partial payment deposits with the final payment due and payable after Buyer's final inspection and acceptance of the vessel at the ''offshore delivery point.'' Seller's right to retain the deposits are contingent upon Buyer's acceptance of the vessel after final inspection. The risk of loss remains with the Seller up to the ''final inspection and delivery'' to Buyer. Possession and control is to remain with Seller prior to delivery of the vessel to Buyer. No title clauses are expressed in the contract. Under Uniform Commercial Code section 2401 and Regulation 1628(b)(3)(D), absent a contractual provision that title passes prior to delivery, title passage occurs at the time seller completes its duties with respect to physical delivery of the property. Under these circumstances, the sale of the vessel occurs outside California and, thus, is not subject to sales tax.

As long as the vessel is delivered outside of California, is first functionally used outside of California, and is functionally used in excess of 90 days outside of California, prior to any entry into California [see note below], the Buyer's subsequent California use, if any, will not be subject to California's use tax. If the vessel is delivered outside of California and enters California waters within 90 days after purchase, the Buyer will be subject to use tax unless the vessel is used or stored outside of California one-half or more of the time during the six months after the vessel entered California waters. 7/9/97. (Am. 2006-1). (Am. 2007-2).

~~(~~Note: ~~SB 1100 (Stats. 2004, Ch. 226) operative October 2, 2004 amended section 6248(a). As amended, f~~For the period October 2, 2004 through June 30, ~~2006~~2007, ~~and~~ under ~~the~~ certain conditions ~~specified in subdivisions (a)(1), (a)(3), or (a)(4) of section 6248,~~ any vehicle, vessel or aircraft purchased outside California and brought into the state within 12 months from the date of its purchase is presumed to be acquired for storage, use, or other consumption in California and subject to use tax. Regulation 1620(b)(5).

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Revise annotation 590.0150 ~~**Posted Tax—Included Statements—Vending Machines.** Tax reimbursement is presumed included on only taxable sales. Exempt sales, though for the same price, do not include tax reimbursement. Thus taxable and exempt items sold from a vending machine for the same price are deemed to be tax included with respect to taxable items and no excess tax reimbursement on exempt sales results from the fact that all items are sold for the same price.~~ **Posted "Tax Included" Statements on Vending Machines.** A statement on vending machines such as ''tax included on all taxable items'' or ''applicable tax included'' presumes that tax is included only on taxable items and no excess tax reimbursement exists. On the other hand, a statement such as ''all sales include tax reimbursement'' creates a presumption that tax was charged on all sales and, to the extent there were exempt sales, excess tax reimbursement would exist. 9/9/83~~.~~; 9/28/94. (Am. 2007-2).

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